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86-5953

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

JAY D. SCOTT,

Petitioner,

-vs-

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

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Supreme Court, U.S.
FILED
NOV 2 - 1986
JOSEPH F. SPANIOL, JR.
CLERK

QUESTIONS PRESENTED

I. WHETHER THE OHIO STATUTORY DEATH PENALTY SCHEME, WHICH PERMITS THE JURY TO CONSIDER AS AN AGGRAVATING CIRCUMSTANCE THAT THE OFFENDER COMMITTED AN AGGRAVATED MURDER WHILE COMMITTING THE CRIME OF AGGRAVATED ROBBERY FAILS IN ITS REQUIRED DUTY TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, BECAUSE IT ALLOWS THE JURY TO CONSIDER AN ELEMENT OF THE UNDERLYING CRIME AS AN AGGRAVATING CIRCUMSTANCE?

II. WHETHER A JURY INSTRUCTION VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN IT ORDERS THE JURY NOT TO BE INFLUENCED BY ANY CONSIDERATION OF SYMPATHY AND IMPROPERLY FORCES THE JURY TO DISREGARD THE VERY ESSENCE OF MITIGATION WHILE MAKING ITS SENTENCING DETERMINATION IN A CAPITAL CASE?

III. WHETHER THE PROSECUTION AND TRIAL COURT'S REPEATED COMMENTS AND THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT ITS DEATH VERDICT WAS ONLY A NON-BINDING RECOMMENDATION AND THAT THE TRIAL COURT WOULD MAKE THE ULTIMATE DECISION TO IMPOSE THE DEATH PENALTY DIMINISHED THE JURY'S RESPONSIBILITY TO IMPOSE AN INDIVIDUALIZED DEATH SENTENCE IN THIS CAPITAL CASE DEPRIVED PETITIONER OF HIS RIGHT TO LIFE WITHOUT DUE PROCESS?

IV. WHETHER WHEN THE TRIAL COURT, DURING THE VOIR DIRE SELECTION OF THE JURY, TELLS THE JURY THAT THE PETITIONER WAS INVOLVED IN THE OFFENSES OF AGGRAVATED MURDER AND IN THE AGGRAVATED ROBBERY FOR WHICH HE STANDS TRIAL, IRREPARABLE HARM IS DONE TO THE PRESUMPTION OF INNOCENCE WHICH PROTECTS THE PETITIONER DURING TRIAL, AND THE PETITIONER'S RESULTING CONVICTIONS AND DEATH SENTENCE DO NOT COMPORT WITH FUNDAMENTAL FAIRNESS OR DUE PROCESS OF LAW?

TABLE OF CONTENTS

	PAGE
Questions Presented.	i
Table of Authorities	iii
Opinions Below	v
Jurisdiction	vi
Constitutional and Statutory Provisions.	vii
Statement of the Case.	1
Manner in which Questions Presented Below.	5
Argument:	
I. THE OHIO STATUTORY DEATH PENALTY SCHEME, WHICH PERMITS THE JURY TO CONSIDER AS AN AGGRAVATING CIRCUMSTANCE THAT THE OFFENDER COMMITTED AN AGGRAVATED MURDER WHILE COMMIT TING THE CRIME OF AGGRAVATED ROBBERY, VIO LATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, BECAUSE IT ALLOWS THE JURY TO CONSIDER AN ELEMENT OF THE UNDERLYING CRIME AS AN AGGRAVATING CIRCUM STANCE, AND THEREBY FAILS IN ITS REQUIRED DUTY TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.	8
II. A JURY INSTRUCTION VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN IT ORDERS THE JURY NOT TO BE INFLUENCED BY ANY CONSIDERATION OF SYM PATHY AND IMPROPERLY FORCES THE JURY TO DISREGARD THE VERY ESSENCE OF MITIGATION WHILE MAKING ITS SENTENCING DETERMINATION IN A CAPITAL CASE	17
III. THE PROSECUTION AND TRIAL COURT'S REPEATED COMMENTS DURING VOIR DIRE AND THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT ITS DEATH VERDICT WAS ONLY A NON-BINDING RECOM- MENDATION AND THAT THE TRIAL COURT WOULD MAKE THE ULTIMATE DECISION TO IMPOSE THE DEATH PENALTY DEPRIVED PETITIONER OF HIS RIGHT TO LIFE WITHOUT DUE PROCESS, AS THEY DIMINISHED THE JURY'S RESPONSIBILITY TO IMPOSE AN INDIVIDUALIZED DEATH SENTENCE IN THIS CAPITAL CASE.	20
IV. WHEN THE TRIAL COURT, DURING THE VOIR DIRE SELECTION OF THE JURY, TELLS THE JURY THAT THE PETITIONER WAS INVOLVED IN THE OFFENSES OF AGGRAVATED MURDER AND IN THE AGGRAVATED ROBBERY FOR WHICH HE STANDS TRIAL, IRREPAR- ABLE HARM IS DONE TO THE PRESUMPTION OF INNO- CENCE WHICH PROTECTS THE PETITIONER DURING TRIAL, AND THE PETITIONER'S RESULTING CONVIC- TIONS AND DEATH SENTENCE DO NOT COMPORT WITH FUNDAMENTAL FAIRNESS OR DUE PROCESS OF LAW .	28
Conclusion	33
Certificate of Service	33
Appendix - separately presented pursuant to Rule 21.1(K)	

TABLE OF AUTHORITIES

	PAGE
Bell v. Kelly, 441 U.S. 640 (1979)	[illegible]
Caldwell v. Mississippi, ___ U.S. ___, 106 S.Ct. 689 (1986).	12
Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985)	6,21,22,23, 24,25,26,27
California v. Ramos, 463 U.S. 992 (1983)	24
Eddings v. Oklahoma, 455 U.S. 104 (1982)	17,18
Enmund v. Florida, 458 U.S. 784 (1982)	12
Estelle v. Williams, 425 U.S. 502 (1976)	28
Furman v. Georgia, 408 U.S. 238 (1972)	8,20
Godfrey v. Georgia, 446 U.S. 420 (1980).	8,15
Jurek v. Texas, 428 U.S. 262 (1976).	11
In re Winship, 397 U.S. 358 (1970)	28
Lockett v. Ohio, 438 U.S. 586 (1978)	17,18
Quercia v. United States, 289 U.S. 466 (1933).	29,31,32
Sandstrom v. Montana, 442 U.S. [illegible] (1979).	25,26,32
Starr v. United States, 153 U.S. 614 (1894).	29,31,32
Taylor v. Kentucky, 436 U.S. 479 (1978).	28
United States v. Murdock, 290 U.S. 389 (1933).	29
Woodson v. North Carolina, 428 U.S. 280 (1976)	17
Zant v. Stephens, 462 U.S. 862 (1983).	8,15
FEDERAL COURTS OF APPEAL	
Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), cert. denied ___ U.S. ___ 106 S.Ct. 4546 (1985).	13,14 15,16
OHIO SUPREME COURT	
State v. Barnes, 25 Ohio St. 3d 203 (1986)	12
State v. Jenkins, 15 Ohio St. 3d 164 (1984), cert. denied 473 U.S. ___ (1985).	5,11,12
State v. Johnson, 24 Ohio St. 3d 87 (1986)	15
State v. Scott, 26 Ohio St. 3d 92 (1986)	5,6,7, 11,25
State v. Williams, 23 Ohio St. 3d 16 (1986).	26

TABLE OF AUTHORITIES, CONT.

OTHER COURTS	PAGES
Colley v. State, 405 So. 2d 374 (Ala. 1979).	15
People v. Brown, 40 Cal. 3d 512, 709 P. 2d 440 (1985), cert. granted sub nom California v. Brown, ___ U.S. ___, 106 S.Ct. 2274 (1986).	19
People v. Easley, 34 Cal. 3d 858 (1983).	17
Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977).	15
State v. Silhan, 275 S.E. 2d 450 (N.C. 1981)	15
UNITED STATES CONSTITUTION	
Amendment VIII	17
Amendment XIV.	17
STATUTES	
Ohio Revised Code §2903.01	8
Ohio Revised Code §2903.02, et seq.	1
Ohio Revised Code §2929.04	9,10

OPINIONS BELOW

The reported opinion of the Ohio Supreme Court, affirming the judgment and sentence of death against Petitioner, is reported at 26 Ohio St. 3d 92 (1986) and is reproduced in the appendix beginning at page A-1. The unreported opinion of the Ohio Court of Appeals - Eighth Appellate District is reproduced in the appendix beginning at page A-18. The Cuyahoga County Court of Common Pleas (trial court) issued a sentencing opinion which is reproduced in the appendix beginning at page A-15.

Petitioner has relied upon the following Ohio Supreme Court cases, State v. Barnes, 25 Ohio St. 3d 203 (1986) reproduced at appendix page A-65; State v. Jenkins, 15 Ohio St. 3d 164 (1984), appendix page A-71; State v. Johnson, 24 Ohio St. 3d 87 (1986), appendix page A-146, and State v. Williams, 23 Ohio St. 3d 16 (1986) appendix page A-159.

Petitioner has relied upon the following case from the 8th Circuit for the Federal Court of Appeals, Collins v. Lockhart, 754 F. 2d 258 (8th Cir. 1985), cert den. ___ U.S. ___, 106 S. Ct. 4546 (1985) A-169.

Petitioner has relied upon the following cases from the supreme courts of other states Cooley v. State, 405 So. 374 (Ala. 1979) A-180; People v. Brown, 40 Cal 3d 512, 220 Cal. Rptr. 637 (1985) cert. granted sub nom California v. Brown, ___ U.S. ___, 106 S. Ct. 2274 (1986) A-199; People v. Easley, 34 Cal. 3d 858, 1983) A-222; Provence. State, 337 So. 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977) A-255; State v. Silhan, 275 S.E. 2d 450 (N.C. 1981) A-260.

JURISDICTION

Petitioner respectfully requests this Court to invoke jurisdiction pursuant to 28 U.S.C. §1257(3). On March 22, 1984 a jury in Cuyahoga County, Ohio found Petitioner guilty of Aggravated Murder (causing the death of another while committing an aggravated robbery) with a specification that the Petitioner committed an aggravated murder while committing an aggravated robbery. On March 28, 1984 the same jury recommended that the death sentence be imposed on Petitioner. The trial court sentenced Petitioner to death on April 3, 1984.

The Court of Appeals for the Eighth Appellate District of Ohio affirmed both Petitioner's conviction and sentence on July 3, 1985.

The Ohio Supreme Court affirmed both Petitioner's conviction and sentence on August 20, 1986. Petitioner filed a timely Motion for Rehearing on August 29, 1986, which the Ohio Supreme Court denied on September 23, 1986.

Petitioner prays this Court to grant the Writ of Certiorari in this case involving important questions about the federal constitution and the application of the Ohio death penalty statutes for the reason that the state courts of Ohio in this matter are in conflict with this Court and with the Eighth District Court of Appeals as well as the supreme courts of several sister states, and for the reason that this Court has issued a writ of certiorari on the same issue presented in Question II of this Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

The full text of Amendments involved are reproduced in the Appendix as follows: United States Constitution 8th Amendment A-55; United States Constitution 14th Amendment A-56.

Ohio Revised Code

The full text of the statutes are reproduced in the Appendix as follows: Ohio Revised Code § 2903.01 A-57; Ohio Revised Code § 2929.01 A-58; Ohio Revised Code § 2929.02 A-59; Ohio Revised Code § 2929.022 A-60; Ohio Revised Code 2929.03 A-61; Ohio Revised Code § 2929.04 A-62; Ohio Revised Code § 2929.05 A-63; and Ohio Revised Code § 2929.06 A-64.

STATEMENT OF THE CASE

Petitioner, Jay D. Scott, was indicted, tried and convicted of aggravated murder in that he:

> purposely caused the death of another, to wit: Vinney [sic] Price, while committing or attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery.

Under the Ohio statutory death penalty scheme, Ohio Revised Code §§2929.02 et seq., the death penalty is precluded, unless at least one of eight statutory aggravating circumstances are pleaded by specification in the indictment and proven at trial. Of the eight possible aggravating circumstances, Petitioner's indictment specified only one:

> that the offense [of aggravated murder] presented above was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit aggravated robbery and either the offender was the principle offender in the commission of the aggravated murder or, if not the principle offender, committed the aggravated murder with prior calculation and design.

The facts, as introduced at trial, were that Vinnie Price was shot and killed on May 6, 1983 in the delicatessen she owned. Although several people saw two persons run from the delicatessen and jump into a car, none of these witnesses could identify the men they had seen.

On a subsequent day, Ricky Tramble told the Cleveland Police Department that Petitioner, Edward O'Neal, Michael Streeter, Danny Price, and he were socializing and that Petitioner referred to the incident. Later O'Neal told Tramble that Petitioner had shot Ms. Price.

The police arrested Jones, and he told them that he and Petitioner entered the delicatessen, but only Petitioner was involved in shooting Ms. Price. Subsequently, Petitioner, O'Neal, Streeter, and Jones were all charged with aggravated murder with a felony murder specification and with aggravated robbery. Only Petitioner was convicted of the charges. Jones and O'Neal, who both testified for the state against Petitioner, plead guilty to the reduced charge of robbery. The capital murder charges against them were nolled. Both were ultimately granted shock probation by the same trial court judge who presided over Petitioner's trial. Streeter plead guilty to robbery and received two years' probation.

During the voir dire selection of the jury the trial court told the jury,

> Not only was Mr. Scott--at least from the newspaper reports that I think I had read--was involved in this, there were three other individuals who...

(Transcript of the Record (hereinafter cited as T.) 1009-1010). Defense counsel made an immediate objection to the trial court's comment of Petitioner's being involved. Counsel moved for a mistrial because the comment had irreparably tainted the jury by vitiating the presumption of innocence and because no curative instruction could undo the damage done to Petitioner's right to a fair trial (T. 1034). The State of Ohio joined in Petitioner's motion for a mistrial (T. 1034).

The trial court overruled the joint motion for a mistrial and gave the jury a cautionary instruction that its verdict should be based solely on the evidence, and that it should not be unduly influenced by any remarks the court may have made.

During the voir dire selection of the jury, several veniremen were asked if they would have any difficulty in returning a verdict which would recommend to the trial court that it impose the death penalty, and that the court, not the jury, had the ultimate responsibility to set the sentence.

In its charge to the jury during the sentencing phase the trial court informed the jury that "A jury recommendation to the court that the death penalty be imposed is just that, a recommendation," (T. 3137), and that if the jury voted a life sentence it would

> proceed to determine which of two possible life imprisonment sentences to recommend to the court...
>
> This particular recommendation which you made is binding on the court and I, the judge, must impose the specific life sentence you have recommended.

(T. 3174).

Later in its sentencing phase charge the trial court instructed the jury that,

> You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence to decide all disputed questions of fac to apply the instructions of the Court to your findings, and to render your verdict accordingly.
>
> In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

In his appeal to the Ohio Supreme Court Petitioner argued that the trial court's comments on his involvement during voir dire denied him a fair trial, because his negated the presumption of innocence the jury is instructed to maintain and irreparably tainted the jury against him. Petitioner also argued that the repeated comments made during voir dire and the jury instruction that a death verdict was only a recommendation diminished the jury's responsibility. Petitioner argued that the

instruction invited the jury to impose death for a number of improper reasons having to do with the passing the responsibility for sentence onto the trial court. Petitioner challenged the jury instructions that the jury not be influenced by any consideration of sympathy. Petitioner argued that sympathy was the essence of mitigation, so a no sympathy instruction vitiated the purpose of mitigation and improperly skewed the jury's balancing function in the sentencing phase of determining if the aggravating circumstance outweighed the mitigating circumstances. Petitioner also challenged the constitutionality of an aggravating circumstance which did nothing more than to repeat an element of the underlying crime charged (here an aggravating circumstance charging that Petitioner committed an aggravated murder while committing or attempting an aggravated robbery in the same indictment charging Petitioner with aggravated murder in that he caused a death while committing or attempting to commit aggravated robbery). Petitioner argued that such an aggravating circumstance failed in its essential duty to narrow that class of persons eligible for death.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner, in briefs before both the Ohio Supreme Court and the Ohio Court of Appeals challenged the constitutionality of an aggravating circumstance, that of committing an aggravated murder while committing or attempting an aggravated robbery, which did nothing more than repeat the underlying crime of aggravated murder, causing a death while commiting or attempting aggravated robbery, State v. Scott, 26 Ohio St. 3d 92, 107 (1986). The Ohio Supreme Court decided this issue on its merits, by referring to its decision in a similar issue in the case of State v. Jenkins, 15 Ohio St. 3d 164, 178 (1984), where it held:

> any duplication is the result of the General Assembly having set forth in detail when a murder in the course of a felony rises to the leval of a capital offense, thus, in effect, narrowing the class of homicide in Ohio for which the death penalty becomes available as a sentencing option.

Scott, 26 Ohio St. 3d at 107.

Petitioner, in briefs before both the Ohio Supreme Court and the Ohio Court of Appeals, argued that a jury instruction during the sentencing phase which commands the jury not to be influenced by any consideration of sympathy precludes the jury from properly assessing and weighing the mitigating circumstances in his case, because sympathy and mercy are the essence of mitigation, Scott, 26 Ohio St. 3d at 108. Although the Ohio Supreme Court noted that Petitioner did not make a contemporaneous objection to this instruction at trial, Scott, 26 Ohio St. 3d at 108, the Ohio Supreme Court did not rely on the state procedural ground of waiver to decide the issue. Rather, the Ohio Supreme Court cited its decision in the Jenkins case, 15 Ohio St. 3d at 192, that such instructions are designed to insure jury verdicts

which are not the result of arbitrary or capricious actions, Scott, 26 Ohio St. 3d at 108. This Court ruled in Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633, 2638 (1985) that, unless a state court specifically relies on state procedural grounds to dismiss an issue at appeal, federal courts are not precluded from reviewing possible deprivations of federal constitutional rights. The Ohio Supreme Court did not rely on the state procedural ground of waiver, but decided the issue on its merits. Therefore, under Caldwell, this Court has jurisdiction to address the constitutional deprivation occasioned by the trial court's "No Mercy" instruction.

Petitioner argued, in briefs before both the Ohio Supreme Court and the Ohio Court of Appeals, that the jury instruction that its death verdict was only a recommendation, while its life verdict was binding upon the court, diminished the jury's sense of responsibility in its task of weighing the penalties and choosing between life or death. This produced a suspect death verdict, which could have been returned for one of several improper reasons, Scott, 26 Ohio St. 3d at 103. The Ohio Supreme Court noted that there was not a contemporaneous objection to the instruction, Scott, 26 Ohio St. 3d at 103. However, the Ohio Supreme Court did not overrule the issue on the state procedural ground of waiver. Rather the court cited this Court's decision in Caldwell and ruled the instruction was not constitutionally infirm, because it correctly described Ohio statutory law, Scott, 26 Ohio St. 3d at 104. Therefore, this issue has, under Caldwell, been properly preserved and is properly before this Court.

Petitioner argued, in briefs before the Ohio Supreme Court and the Ohio Court of Appeals, that the trial court's comment during voir dire selection of the jury that Petitioner was

involved in the incident improperly crippled the presumption of innocence, which the Constitution guarantees him, Scott, 26 Ohio St. 3d at 95-96. The Ohio Supreme Court ruled that the comment did not have any adverse effect on the jury, because it was said as a preface to examining the veniremen on their possible exposure to pretrial publicity. Therefore, the comment was not meant as a commentary on the Petitioner's guilt or involvement and did not impair his presumption of innocence. In addition, the cautionary instruction issued by the court minimized any prejudicial effect the comment had, Scott, 26 Ohio St. 3d at 96.

Each of the issues which Petitioner raised to this Court were raised to both the Ohio Supreme Court and Court of Appeals and were decided on their merits. The issues have been properly preserved and are properly before this Court.

WHY THE WRIT SHOULD BE GRANTED

I.

THE OHIO STATUTORY DEATH PENALTY SCHEME, WHICH PERMITS THE JURY TO CONSIDER AS AN AGGRAVATING CIRCUMSTANCE THAT THE OFFENDER COMMITTED AN AGGRAVATED MURDER WHILE COMMITTING THE CRIME OF AGGRAVATED ROBBERY, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, BECAUSE IT ALLOWS THE JURY TO CONSIDER AN ELEMENT OF THE UNDERLYING CRIME AS AN AGGRAVATING CIRCUMSTANCE, AND THEREBY FAILS IN ITS REQUIRED DUTY TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

Function of Aggravating Circumstances Is to Limit Imposition of Death

This Court has held that the death penalty violates the constitutional provisions against cruel and unusual punishment, unless said penalty is not being imposed wantonly, arbitrarily or capriciously, Furman v. Georgia, 408 U.S. 238 (1972). In response, Ohio adopted a death penalty structure wherein an offender must be convicted of both aggravated murder and at least one statutory aggravating circumstance, before he can be sentenced to death. The purpose of such aggravating circumstances is to, "circumscribe the class of persons eligible for the death penalty," Zant v. Stephens, 426 U.S. 862, 878 (1983). When an aggravating circumstance fails to narrow the class of persons eligible for death, it fails to perform its required function of insuring that death is not being imposed wantonly or capriciously. A death sentence supported by an aggravating circumstance which fails to limit the class of persons eligible for death cannot withstand the constitutional challenge that it is cruel and unusual punishment, Godfrey v. Georgia, 446 U.S. 420, 428-429 (1980).

Ohio Revised Code §2903.01 defines aggravated murder as purposely causing the death of another either:

> with prior calculation or design

or

> while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

Petitioner was indicted under the second prong, more commonly referred to as "Felony Murder." Petitioner's indictment (attached in the appendix) states Petitioner purposely:

> caused the death of another, to-wit: Vinney [sic] Price, while committing or attempting to commit or while fleeing immediately after committing or attempting to commit Aggravated Robbery.

Of the eight possible statutory aggravating circumstances, Petitioner was charged with only one:

> that the offense [of Aggravated [felony] Murder was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Robbery and either the offender was the principal offender in the commission of the Aggravated Murder, or, if not the principal offender, committed the Aggravated Murder with prior calculation and design.

Petitioner's Argument: Changed Aggravating Circumstance Fails to Narrow

Petitioner challenged the validity of the lone aggravating factor lodged against him. He argued that the aggravating factor did nothing more than duplicate an element of the crime, that he caused the death of another, while committing aggravated robbery, and failed in its essential duty to narrow that class of persons for whom the death penalty should be a sentencing alternative.

Of the eight statutory aggravating factors,[1] all except one, the one with which Petitioner was indicted, add additional elements or factors to the crime. Under the other seven,

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[1] §2929.04 Criteria for imposing death or imprisonment for a capital offense.
(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to §2941.14 of the Revised Code and proved beyond a reasonable doubt:
(1) The offense was the assassination of the President of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate

an aggravated murder is elevated into a capital murder, because of some additional, aggravating factor. The "Felony Murder" aggravating factor, on the other hand, adds nothing. A felony murder bootstraps itself into a capital murder by the simple act of re-alleging that the murder was committed while committing one of the listed felonies. No extra analysis of additional factors is required, because no additional factor is added.

Petitioner also argued that the felony murder aggravating factor is illogical. A man who with premeditation commits

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Fn. 1 cont.

> for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.
> (2) The offense was committed for hire.
> (3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.
> (4) The offense was committed while the offender was a prisoner in a detention facility as defined in §2921.01 of the Revised Code.
> (5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.
> (6) The victim of the offense was a peace officer, as defined in §2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.
> (7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder, or, if not the principal offender, committed the aggravated murder with prior calculation and design.
> (8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

the most heinous axe-murder on an elderly victim would not, without an additional factor, be eligible for the death penalty. However, a man who did not plan to kill anyone but who did kill during the course of another felony would be eligible for the death penalty without any additional factors. No reason supports such disparate treatment.

Petitioner also argued that the felony murder aggravating factor is illogical. A man who with premeditation commits the most heinous axe-murder on an elderly victim would not, without an additional factor, be eligible for the death penalty. However, a man who did not plan to kill anyone but who did kill during the course of another felony would be eligible for the death penalty without any additional factors. No reason supports such disparate treatment.

Ohio Supreme Court Action

In rejecting Petitioner's argument the Ohio Supreme Court relied exclusively on its earlier decision in State v. Jenkins, 15 Ohio St. 3d 164 (1984), Scott, 26 Ohio St. 3d at 107. In Jenkins the Ohio Supreme Court cited language from Jurek v. Texas, 428 U.S. 262, 271 (1976), where this Court wrote:

> So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas [which statutorily limited the death penalty to one of five classifications of murder] and the other two States is that the death penalty is an available sentencing option--even potentially—for a smaller class of murderers in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime.

The Ohio Supreme Court applied Jurek and concluded:

> any duplication is the result of the General Assembly having set fourth in detail when a murder in the course of a felony rises to the level of a capital offense, thus, in effect, narrowing the class of homicides in Ohio for

which the death penalty becomes available as a sentencing option.

Jenkins, 15 Ohio St. 3d at 178.

The Jenkins Court indicated that the Ohio "Felony Murder" aggravating factor did sufficiently narrow the field, because it limited the death penalty to those who were the principal offenders of the felony murder and/or those aiders and abettors who acted with prior calculation and design; and because it limited the death penalty only to murders committed during the commission of certain listed felonies, not all felonies, Jenkins, 15 Ohio St. 3d at 177 n. 17.[2] Neither justification cited by the Ohio Supreme Court limits the class of felony murders who can receive the death penalty or to save the factor from its unconstitutional application on Petitioner.

Why "Limiting" Fails to Limit

In Enmund v. Florida, 458 U.S. 784 (1982) this Court ruled that the death penalty cannot be imposed against an offende who aided and abetted in a felony during which someone is killed but who did not himself kill; unless the offender intended that the killing take place. The Ohio statute, that the offender must be either the principal in the killing or have acted with prior calculation and design, is nothing more than a codification of the Enmund rule. It does not limit the class of persons eligible for death in any way, as persons who fall outside of the Enmund rule are not eligible for death. The only effect that "the principal offender" or "acted with prior calculation and design" language has, in light of the Enmund rule, is that it codifies what state body is responsible for making the Enmund determination in anticipation of Cabana v. Bullock, ___ U.S. ___, 106 S.Ct. 689 (1986).

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[2] The Ohio Supreme Court made this holding specifically in State v. Barnes, 25 Ohio St. 3d 203, 206-207 (1986).

The fact that a murder can qualify for the death penalty only if committed during the commission of a limited number of felonies also fails to narrow the class of persons eligible for the death penalty. Under the Ohio statutory scheme, anyone who commits a murder while committing aggravated robbery is automatically eligible for the death penalty. Once the jury finds the offender guilty of the underlying crime in the guilt phase, there is little, if any, possibility that it will find the offender not guilty of an aggravating circumstance, which simply repeats the crime of which it has just convicted the offender. The felony murderer enters the sentencing phase with a built-in aggravating factor, without any particularized evaluation as to why this offender is deserving of death. There is no individualized deliberation as to why robber-murderer A deserves death while robber-murderer B does not.

Case Law Support

Because the felony murderer enters the sentencing phase with built-in aggravating circumstances, the Eighth Circuit found aggravating circumstances which merely repeat elements of the underlying crime to be repugnant to the Constitution, Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), cert. denied ___ U.S. ___, 106 S.Ct. 4546 (1985). The State of Arkansas had an aggravating circumstance of murder for pecuniary gain. The Arkansas courts interpreted robberies for pecuniary gain to include murders committed while committing the crime of robbery, Collins, 754 F.2d at 261-262.

In Collins the Eighth Circuit analyzed the elements of the first degree murder while committing a robbery and the aggravating circumstance of murder for pecuniary gain, and determined that they duplicated each other. No such analysis is required in

the Ohio scheme. This Court need only look at the indictment to see that the language of the body of the indictment that Petitioner caused the death of Vinnie Price,

> while committing or attempting to commit or while fleeing immediately after committing or attempting to commit Aggravated Robbery

is a word-for-word duplicate of the language in the specification,

> the offense presented above was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Robbery.

In the face of identical language, there can be no doubt that the sole aggravating circumstance with which Petitioner was charged duplicates an element of the underlying crime with which he had been charged and adds nothing new for the jury to consider. The question is: does such duplication violate the Eighth and Fourteenth Amendments?

Collins found that the function of aggravating circumstances was to reduce the danger that the death penalty would be imposed wantonly or arbitrarily. They function properly when they are objective criteria, "that can be used to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying capital crime." Collins, 754 F.2d at 264. The Collins court went on to hold:

> We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function. Every robber-murderer has acted for pecuniary gain. A jury which has found robbery murder cannot rationally avoid also finding pecuniary gain. [Just as a jury which has found murder while committing Aggravated Robbery cannot avoid finding a specification that the offender committed murder while committing Aggravated Robbery.] Therefore, the pecuniary-gain [or Ohio's aggravated robbery] aggravating circumstance cannot be a factor that distinguishes some robber-murderers from others. In

> effect, a robber-murderer enters the sentencing phase with a built-in aggravating circumstance. Since under Arkansas [and Ohio] law and the Eighth Amendment as elaborated by the Supreme Court in Godfrey v. Georgia, supra, only one aggravating circumstance is required to impose the death penalty, the State has no need to show any additional aggravating circumstances at the sentencing phase. Thus, if no other aggravating circumstances are found [no other aggravating circumstances were found in Petitioner's trial, as he was charged with only one aggravating factor and the Ohio Supreme Court forbids consideration of any aggravating factor which was not charged in the indictment, Jenkins, 15 Ohio St. 3d at 207 and State v. Johnson, 24 Ohio St. 3d 87, 93 (1986)], the jury is left to decide whether to impose death on a robber-murderer without having made any finding which narrows the class of persons who have committed this death-eligible crime.

Collins, 754 F.2d at 264 (emphasis added). Once the offender has been found guilty of the underlying crime, he cannot be sentenced to death, unless the jury additionally finds some aggravating circumstance, which makes his crime more heinous and worthy of death. When the aggravating factor does nothing more than duplicate the crime, this additional safeguard is completely avoided, Collins, 754 F.2d at 265.

For all of the above reasons, the Eighth Circuit held in Collins that an aggravating circumstance which merely duplicates an element of the crime cannot sufficiently narrow the class of persons eligible for death under Stephens and Godfrey.

Other jurisdictions have also concluded that an aggravating circumstance which duplicates an element of the crime is constitutionally infirm. See e.g. State v. Silhan, 275 S.E. 2d 450, 478 (N.C. 1981), Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), and Colley v. State, 405 So. 2d 374 (Ala. 1979).

Reasons for Issuing the Writ

The Supreme Court of Ohio is in direct conflict with the Eighth Circuit in Collins as well as the supreme courts of North Carolina, Florida, and Alabama. The question involved is one of great national and constitutional importance, as a large number of the states have a felony murder or murder for pecuniary gain aggravating circumstances. Moreover, the conflict that exists between Ohio and the other cited state jurisdictions and the Eighth Circuit shows that the issue is far from settled or clear. This Court should grant Petitioner's writ for certiorari, so that it can definitively answer the question: may a state constitutionally imposed death upon an offender, when an aggravating circumstance upon which the jury relied in voting for the death penalty, fails to narrow the class of persons eligible for death, because it does nothing more than duplicate an element of the underlying crime?

II.

A JURY INSTRUCTION WHICH ORDERS THE JURY NOT TO BE INFLUENCED BY ANY CONSIDERATION OF SYMPATHY AND IMPROPERLY FORCES THE JURY TO DISREGARD THE VERY ESSENCE OF MITIGATION WHILE MAKING ITS SENTENCING DETERMINATION IN A CAPITAL CASE, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Essence of Mitigation Is Sympathy

The Constitution commands that the sentencing authority in all capital cases must consider any and all mitigating factors, Lockett v. Ohio, 438 U.S. 586, 604 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 113-115 (1982). In Woodson v. North Carolina, 428 U.S. 280, 304 (1976) this Court equated "mitigating" factors and "compassionate" factors. This line of cases "make[s] it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any 'sympathy factor' raised by the evidence before it," People v. Easley, 34 Cal. 3d 858, 876 (1983).

The essence of mitigation is sympathy. However, despite the fact that the essence of mitigation is sympathy, the trial court also instructed the jury:

> You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence to decide all disputed questions of fact, to apply the instructions of the Court to your findings, and to render your verdict accordingly.
>
> In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

(Emphasis added).

Essence of the "No Mercy" Instruction

The instructions involved are standard jury instructions given in all criminal trials in Ohio. In fact, the same instructions were given in the guilt phase of Petitioner's trial. However, when the same instructions invade the penalty phase of a capital trial grave constitutional problems occur.

The jury is told that it must consider mitigating evidence, evidence which is designed to evoke mercy from the jury by playing to its sense of sympathy. At the same time, however, the jury is told it cannot consider any sympathy factor. The result is a conflict which the jury can only resolve by ignoring any effect that the mitigating evidence had.

The conflict created by the "no mercy" instruction denies the defendant the opportunity to have the jury consider his mitigating evidence. The jury was told it could not consider the mitigating evidence for the very purpose for which it had been introduced. As a result, the jury did not properly consider the mitigating factors which Lockett and Eddings command it must consider. Petitioner's death sentence is tainted by the fact that the jury was forbidden from considering the mitigating evidence before it for its intended purpose, to evoke enough sympathy in the jury to prompt a life recommendation.

The problem is exacerbated under the Ohio death penalty scheme. In Ohio the jury must weigh the aggravating circumstances against the mitigating circumstances. If it finds that the aggravating factors outweigh the mitigating circumstances, the jury must return a death verdict. When a jury cannot consider the mitigating evidence for its only possible use, sympathy, it can-

not find that the mitigation circumstances outweigh the aggravating circumstances. The "no mercy" instruction mandates a death verdict in all capital cases in Ohio.

Reasons for Issuing the Writ

The issue of the "no mercy" instruction is presently before this Court, People v. Brown, 40 Cal. 3d 512, 709 P. 2d 440 (1985), cert. granted sub nom California v. Brown, ___ U.S. ___, 106 S.Ct. 2274 (1986). This Court should issue a writ of certiorari in Petitioner's case, as it raises the same issue pending before this Court in Brown and disposition of the one case will automatically result in the disposition of the other.

III.

THE PROSECUTION AND TRIAL COURT'S REPEATED COMMENTS DURING VOIR DIRE AND THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT ITS DEATH VERDICT WAS ONLY A NON-BINDING RECOMMENDATION DEPRIVED PETITIONER OF HIS RIGHT TO LIFE WITHOUT DUE PROCESS, AS THEY DIMINISHED THE JURY'S RESPONSIBILITY TO IMPOSE AN INDIVIDUALIZED DEATH SENTENCE IN THIS CAPITAL CASE.

Purpose and Function of Sentencing Phase

Since the landmark decision in Furman v. Georgia, 408 U.S. 238 (1972), this Court has consistently struck down death penalty statutes which do not sufficiently provide for sufficient individualized deliberation to guarantee that the death penalty is not being imposed freakishly, wanton'y or capriciously. Ohio, like many states, responded to the Furman mandate with a bifurcated trial that includes a guilt phase and a separate sentencing phase.

During the Ohio sentencing phase the jury weighs the aggravating factor or factors against any mitigating factors. If the jury finds beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating circumstances, it must recommend death. The jury's death recommendation is not binding on the trial court. The judge does have the power to override the jury's death verdict and impose a life sentence. If, on the other hand, the jury finds the mitigating circumstances outweigh the aggravating circumstances, it must return a life recommendation. Such a recommendation is binding on the trial court. It cannot override a jury's life verdict and impose death.

It is inaccurate to say that the jury in Ohio has nothing to do with the sentence imposed, for the jury makes the initial determination which decides if death can ever be imposed. Therefore, the jury's verdict must receive the full panoply of Furman protections and safeguards in order to insure that any death verdict is the appropriate result of individualized deliberations and concerns. Anything that would hinder those indiv-

idualized deliberations or reduce the jury's sense of responsibility toward the deliberations renders a resulting death verdict so suspect, that it should be voided.

In Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985), four members of this Court unequivocally held that no death penalty may stand, when the jury has been "led to believe that the responsibility for determining the appropriateness of the defendant's death rests [elsewhere]." Caldwell, ___ U.S. ___, 105 S.Ct. at 2636. This Court reversed the death sentence imposed in Caldwell, because the prosecutor's closing argument, that any death sentence was automatically reviewable by the Mississippi Court of Appeals,

> urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death - a determination which would eventually be made by others and for which the jury was not responsible.

Caldwell, ___ U.S. ___, 105 S.Ct. at 2643.

Responsibility Diminishing Comments

Numerous responsibility-diminishing comments and arguments were made to the jury in Petitioner's trial. During voir dire either the prosecutor, the court, or both told jurors their death verdict was only a recommendation. During the jury instructions of the sentencing phase, the trial court told the jury:

> A jury recommendation to the Court that the death penalty be imposed -- just that, a recommendation,

and that if it returned a life verdict it was to,

> proceed to determine which of the two possible life imprisonment sentences to recommend to the Court...

> This particular recommendation--which you make is binding upon the Court, and the Judge must impose the specific life sentence which you have recommended.

(Emphasis added). In addition, the verdict forms, which were read in open court and which the jury had during its deliberation, emphasized the concept of a jury recommendation with the following language:

> We, the jury, in this case, being duly impaneled and sworn, do find beyond a reasonable doubt Aggravating Circumstances which the defendant, Jay Scott, was found guilty of committing are sufficient to outweigh the Mitigating Factors presented in this case.
>
> We, the jury, recommend the sentence of death be imposed on the defendant, Jay Scott.
>
> We, the jury, in this case, being duly impaneled and sworn, do find that the Aggravating Circumstances which the defendant, Jay Scott, was found guilty of committing are not sufficient to outweigh the mitigating factors presented in this case. We the jury recommend that the defendant, Jay Scott, be sentenced to life imprisonment.

(Emphasis added).

The "constitutionally impermissible" practice of informing the jury, that the responsibility for determining if death was appropriate lay with someone else, permeated Petitioner's trial. From the voir dire down to the jury forms the jury held during its deliberations on Petitioners' death, the jury had constant reminders that they could only recommend death, that the final decision of life or death was up to Judge McManamon. The rule in Caldwell was violated and violated repeatedly. The jury's decision as to the death sentence is, therefore, skewed and suspect. The death sentence imposed on Petitioner should be reversed.

Caldwell Misapplied by Ohio Supreme Court

The rule in Caldwell is that any statement which leads the jury to believe that someone other than the jury itself will make the ultimate decision on life or death, renders the jury's death verdict invalid, Caldwell, 105 S.Ct. 2639. The Caldwell opinion cited several reason why such statements require reversal.

When a jury knows someone will review and correct its death verdict, it may well recommend death in inappropriate cases. The jury might return a death verdict, even if it felt death was inappropriate, because it was sure the judge would correct it. In this way the jury could send a message of disapproval to the defendant, because it believed the judge, a learned and respected authority, would correct its error, Caldwell, 105 S.Ct. at 2641.

The jury may wish to escape from responsibility of deciding a literal matter of life or death. Thus, when the jury is told its life recommendation is binding but its death recommendation will be evaluated for appropriateness by the judge, the jury will recommend death to escape its duty. In that way the jury can insure that a judge reviews the decision and can delegate the responsibility for deciding on life or death to the judge. The jury would not be recommending death because it was appropriate, but because it would be the only way the jury could escape the awesome responsibility of deciding on another man's life, Caldwell, 105 S.Ct. at 2641.

The jury might also recommend death in close cases, in which it could not decide which penalty to impose, in order to insure that the trial court judge, a man it regards as a respected and trained authority, can review the verdict and guarantee the proper result. Such juries would be deferring their

responsibility to the judge. Again, the jury would recommend death, not because it was appropriate, but because it would be the only way to gain the desired judicial review, Caldwell, 105 S.Ct. at 2642.

For all of these reasons, the Caldwell Court ruled that statements which cause the jury to believe that the ultimate decision on life or death lies with someone else are inherently inaccurate. Even if the statement correctly sets out the prevailing statutory law, it is an inaccurate representation of prevailing constitutional law, "because it depict[s] the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform," Caldwell, 105 S.Ct. at 2643.

The jury in Petitioner's trial was told repeatedly that the trial judge would review a death verdict for appropriateness. It is possible that the jury did return its death verdict for one of the inappropriate reasons listed in the Caldwell decision. The same jury, had it not been conditioned to abrogate its sentencing responsibility to the trial court, may have returned a life verdict; a verdict which would have been binding and which would forever have precluded the State of Ohio from executing Petitioner. The Caldwell errors which occurred at Petitioner's trial did have a marked effect upon his fate.

In affirming Petitioner's sentence the Ohio Supreme Court relied on language from Justice O'Connor's lone concurrence to distinguish Petitioner's case from Caldwell, where she wrote, "I do not read [California v.] Ramos [463 U.S. 992 (1983)] to imply that the giving of nonmisleading and accurate information regarding the jury's role in the sentencing scheme is irrelevant to the sentencing decision...neither does Ramos suggest that the Federal Constitution prohibits the giving of accurate instructions regarding postsentencing procedures," Caldwell, ___ U.S.

___, 105 S.Ct. at 2646 (O'Connor, J., concurring, emphasis in original). The Ohio Supreme Court ruled that, as the instructions given were "an accurate statement of the law," then under Justice O'Connor's concurrence, there was no Caldwell error in Petitioner's trial, Scott, 26 Ohio St. 3d at 104.

The Ohio Supreme Court's reliance upon Justice O'Connor's concurrence is misplaced. It ignores the holding of the case, that all such statements and instructions are inaccurate, because they misstate the constitutional law and principles involved, Caldwell, ___ U.S. ___, 105 S.Ct. at 2643. In addition, the instructions in Petitioner's trial were not accurate so cannot stand, even under the concurrence.

The Ohio Supreme Court determined that the jury instructions in Petitioner's case correctly parroted the statutory provision, so were accurate. It ignored the fact that the issue of an instruction's accuracy is far broader than the simplistic question of whether it correctly regurgitates the statute. For a jury instruction to be accurate it must not only correctly state the law, it must also be worded so that the jury cannot incorrectly interpret what is being told.

In Sandstrom v. Montana, 442 U.S. 510 (1979), the trial court instructed the jury, "the law presumes that a person intends the ordinary consequences of his voluntary acts." Sandstrom, at 512. The instruction correctly described the legal principle involved. Nevertheless, this Court found the instruction to be inaccurate and constitutionally infirm, because the jury might have interpreted it as creating a conclusive presumption. In writing for the majority, Justice Brennan said, "The Supreme Court of Montana is, of course, the final authority on the legal weight to be given a presumption under Montana Law [Was the instruction a correct statement of the law?], but it is not the

final authority on the interpretation which a jury could have given the instruction [Was the instruction accurate or misleading?]." Sandstrom, at 516-517. This Court found the instruction in Sandstrom to be infirm because the jury could have misinterpreted it. Sandstrom, at 519.

This Court must examine the jury instructions in Petitioner's case for their accuracy under Caldwell and Sandstrom. Even though the Ohio Supreme Court ruled them to be accurate, it is only the final authority on the technical correctness of the instructions, not on the interpretation the jury might have given the instructions.

The instructions given the jury in Petitioner's trial were:

> A jury recommendation to the Court that the death penalty be imposed is just that -- a recommendation.

The instruction could well lead the jury to believe that trial courts in Ohio routinely reject inappropriate death verdicts and correct the juries' errors. In such a case the jury, believing that any mistake it made would be corrected, would vote for death in order to insure the check offered by judicial review.

In actual fact trial courts do not routinely reject death verdicts. "As of February 17, 1986, sixty-three death sentences had been imposed under the Ohio statute. Of that number only one individual's death sentence was modified to life imprisonment by a trial court," State v. Williams, 23 Ohio St. 3d 16, 35 (1986) (Wright, J., dissenting, emphasis in original). It is exactly the same false interpretation that death verdicts are routinely overturned on review, that Justice O'Connor called inaccurate, misleading, and reversible error, Caldwell, ___ U.S. ___, 105 S.Ct. at 2646-47. (O'Connor, J., concurring).

The instructions in Petitioner's case violate the rule established by both the plurality in Caldwell and Justice O'Connor's concurrence. The inaccurate instruction diminished the jury's sense of responsibility in Petitioner's trial. Petitioner's jury, after its sense of responsibility had been so impaired, was not able to make the individualized assessment of appropriateness as to death that this Court requires. For this reason Petitioner's death sentence must be reversed.

Reasons for Issuing the Writ

The Ohio Supreme Court has misinterpreted this Court's decision in Caldwell. Moreover, the ambiguity found by the plurality and concurring opinion create confusion as to the validity of instructions such as the one given in Petitioner's trial. This Court should issue the Writ of Certiorari, so that it can correct the Ohio Supreme Court's misapplication of Caldwell, and so that it can clarify the ambiguity in and confusion caused by Caldwell.

IV.

WHEN THE TRIAL COURT, DURING THE VOIR DIRE SELECTION OF THE JURY, TELLS THE JURY THAT THE PETITIONER WAS INVOLVED IN THE OFFENSES OF AGGRAVATED MURDER AND IN THE AGGRAVATED ROBBERY FOR WHICH HE STANDS TRIAL, IRREPARABLE HARM IS DONE TO THE PRESUMPTION OF INNOCENCE WHICH PROTECTS THE PETITIONER DURING TRIAL, AND THE PETITIONER'S RESULTING CONVICTIONS AND DEATH SENTENCE DO NOT COMPORT WITH FUNDAMENTAL FAIRNESS OR DUE PROCESS OF LAW.

Importance of Presumption of Innocence

The presumption of innocence which protects all criminal defendants in the United States is not merely a catch phrase which the Anglo-American system of jurisprudence uses. It is the linchpin of the system. It has been called, "that bedrock 'axiomatic and elementary principle' whose 'enforcement lies at the foundation of the administration of our criminal law'," In re Winship, 397 U.S. 358, 363 (1970). The presumption of innocence, along with its co-principle of placing the burdens of production and persuasion on the prosecution, recognizes that juries are human, thus capable of error or prejudice and serves the essential function of acting as a counterbalance. It alerts the jury that it must not be swayed by the fact that the defendant has been arrested and indicted after a police investigation, and commands the jury to ignore its natural inclination to believe that the defendant must be guilty, if said investigation has centered on him. Bell v. Wolfish, 441 U.S. 520, 533 (1979). The presumption of innocence is so important that this Court has ruled the failure to give a defense requested instruction that the defendant has a presumption of innocence is reversible error, even where the court did instruct the jury that the state had the entire burden of proving guilt beyond a reasonable doubt. Taylor v. Kentucky, 436 U.S. 478 (1978). It, "although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams, 425 U.S. 502, 503 (1976).

Importance of Trial Judge

The trial judge is more than a mere moderator over a trial. He is charged with insuring the "atmosphere of perfect impartiality" in a trial, Glasser v. United States, 315 U.S. 60, 82 (1941). The judge must be circumspect when he addresses the jury, for he is a learned and respected figure of authority and,

> [i]t is obvious that under any system of jury trial the influence of the trial judge on the jury is necessarily and properly of great weight, and his lightest word of intimation is received with deference, and may prove controlling.

Starr v. United States, 153 U.S. 614, 626 (1894).

A trial judge may not assume the role of a witness, he may analyze the evidence, but he should not add to it or distort it, Quercia v. United States, 289 U.S. 466, 470 (1933). For this reason, when the judge informs the jury that in his opinion the defendant lied on the witness stand, there has been an impermissible pall on the presumption of innocence and a denial of due process, Quercia, at 468-469. In the same way, if a trial judge informs the jury that in his opinion, the state had met its burden of proving guilt beyond a reasonable doubt, the resulting conviction cannot stand, United States v. Murdock, 290 U.S. 389, 393 (1933).

Trial Court Told Jury It Believed Petitioner Was Involved

During the voir dire selection of the jury in Petitioner's trial, the trial judge said to the jury,

> Not only was Mr. Scott--at least from the newspaper reports that I think that I had read--was involved in this, there were three other individuals who--[court interrupted by defense objection]

Following a defense objection the court said to the jury,

> just so I can be a little bit more precise, the newspaper, news media coverage, I think indicated that there were four individuals who ultimately had been accused of robbery, and ultimately the killing of the victim, Vinnie Price. Other than that, I really don't know an awful lot more about it.

This statement, while more neutral, did nothing to correct or alter the fact that the trial judge had told the jury that, based on what he had read, he believed the Petitioner was one of the four men involved. Ultimately, the defense moved for a mistrial on the grounds that the trial judge had irreparably tainted the jury and removed from them any possibility of a presumption of innocence. The State of Ohio joined in the motion for a mistrial. The trial court denied the motion and instead read an instruction telling the jury to disregard anything the court may have said which might have indicated how it thought the trial should be decided. At the time that these exchanges occurred, ten of the twelve jurors who decided Petitioner's guilt and recommended that he receive the death sentence were in the prospective venire panel and heard the trial court tell them that the Petitioner was involved in the robbery and murder or Vinnie Price.

Ohio Supreme Court Decision

The Ohio Supreme Court found that the trial judge's comments did not prejudice Petitioner. The Ohio Supreme Court determined that the comments were made during the voir dire selection of the jury and were intended as a preface to questioning the jury about their exposure to the pretrial publicity. For this reason, and because the trial court did give a cautionary instruction, the Ohio Supreme Court believed that the comment was not misused by the jury and did not cast any aspersion on Petitioner's innocence.

Why Comment Prejudiced Petitioner

The Ohio Supreme Court, in its attempt to minimize the prejudicial effect of the trial judge's comments, has placed great significance on matters which are of no significance. It does not matter that the comments were made during the jury selection process. Ten of the jurors who decided Petitioner's

fate heard the trial judge say that, based on what he had read, he believed Petitioner was involved in the robbery and murder. Once this impression was in their minds, it could only have a negative effect on the manner in which they heard and processed the testimony during the trial. Rather than having no effect, the comments had a negative effect during the time when the jury is supposed to be at its most impartial--during the reception of the evidence.

It does not matter that the trial court issued a cautionary instruction that the jury should not be swayed by any impression the trial court may have given it as to what the outcome of the trial should be. Some errors and due process deprivations are so gross that no amount of curative or cautionary instructions can undo the damage done. In both Starr and Quercia, the trial court gave cautionary instructions that the court's opinion was only the court's opinion and that the jury was free to disregard it, if, in the jury's opinion, the court's interpretation was incorrect. This Court reversed both convictions despite the curative instructions, because it realized that the instructions were insufficient to remedy a situation where the trial court informed the jury that it believed the defendant had lied or was guilty. The same situation occurred in Petitioner's trial: the trial court informed the jury that Petitioner was involved in the robbery and murder. No amount of curative or cautionary instruction can remedy the fundamental annihilation of Petitioner's presumption of innocence which the court's comments occasioned.

It is not important that the trial court intended the comments as a preface to questioning the jury about its exposure to pretrial publicity. It is not important because it makes no sense to condition jurors against pretrial publicity by exposing

them to [illegible] publicity said. It is also not important, because what the trial court intended is not controlling. Rather, how the jury could have interpreted the comments controls.

As early as 1894 this Court recognized that how the jury could have interpreted or misinterpreted judges' comments is what determines prejudice, Starr, at 623. More rcently, this Court has had the occasion to reexamine the issue and reached the same conclusion. In Sandstrom v. Montana, 442 U.S. 510 (1978), this Court ruled that the proper test for prejudice is how the jury could have interpreted and applied a judicial statement. When a reasonable interpretation would allow the jury to misuse the statement for some improper purpose, then the comment infringes on a defendant's rights and constitutes reversible error. Sandstrom, at 516-519.

In Petitioner's trial the trial court informed the jury that his interpretation of the newspaper accounts was that the Pettioner wal involved in robbery and murder. It is very likely that the jury interpreted this comment on its face value, that the trial court believed Petitioner was involved. This second interpretation is highly damaging to Petitioner, as there is no correct use for it. The second interpretation informed the jury that Petitioner was in the court's opinion guilty and is no different than the comments in Starr or Quercia. The second interpretation nullified any effect that the Petitioner's presumption of innocence may have had and denied him of a fair trial.

Reasons for Issuing the Writ

A defendant can suffer no greater deprivation of due process than to have his presumption of innocence taken by an injudicious comment by a trial court indicating its belief of the defendant's guilt. This Court should issue Petttioner's writ of certiorari so that it can uphold its long-standing principle that trial courts may not make statements which the jury can interpret as indicating the court's belief in the defendant's guilt.

CONCLUSION

The questions presented in this Petition for Writ of Certiorari are important questions regarding the Constitution of the United States and Ohio's death penalty structure. They are questions involving conflicts between state courts and federal appeals courts. Moreover, this Court has already determined that one of the questions presented in this Writ is of such importance, that it has granted certiorari on the same questions in another case.

This Court should grant Petitioner, Jay Scott, his Petition for Writ of Certiorari, so that the Court can address the important questions raised.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all persons required to be served have been served and that I have sent by first class mail a copy of the foregoing Petition for Writ of Certiorari to John T. Corrigan, Cuyahoga County Prosecutor, The Justice Center - 8th Floor, 1200 Ontario Street, Cleveland, OH 44113 this 24th day of November, 1986.

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ORIGINAL

Supreme Court, U.S.
FILED
JAN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-5953

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JAY D. SCOTT

Petitioner

vs.

STATE OF OHIO

Respondent

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SUPREME COURT, U.S.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTIONS OF LAW

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

1. Whether the Ohio Statutory Death Penalty scheme, which permits the jury to consider as an aggravating circumstance that the offender committed an aggravated murder while committing the crime of aggravated robbery violates the Eighth and Fourteenth Amendments of the United States Constitution.

2. Whether a jury instruction in a capital case violates the Eighth and Fourteenth Amendment of the United States Constitution when it orders the jury not to be influenced by any consideration of sympathy toward any party, and when no objection is offered to the instruction given.

3. Whether Petitioner's Due Process rights were violated by a trial court's instruction to the jury that a death verdict was only a recoumendation, and where no objection was offered to the instruction given, which did not diminish the jury's responsibility to impose a death sentence.

4. Whether a trial judge's comment which did not concern the petitioner's guilt or innocence but, rather, noted the fact that the news media had reported Petitioner's involvement with the crime violated due process of law.

TABLE OF CONTENTS

Counter Questions of Law..... 1

Table of Authorities..... ii

Objections to Jurisdiction..... 1

History of the Case..... 2

Statement of the Facts..... 2

Reasons for Denying the Writ..... 5

Conclusion..... 11

Appendices: Ohio Revised Code Section 2929.03
Ohio Revised Code Section 2929.04
Ohio Revised Code Section 2945.36

TABLE OF AUTHORITES

Cases:

Barclay v. Florida (1983), 463 U.S. 939 at 1144, 103 S. Ct. 3418..... 7

State v. Fanning, 1 Ohio St. 3d 19, 437 N.E. 2d 583 (1982)..... 7,8

State v. Jenkins, 15 Ohio St. 3d 164 (1984)..... 6,7

State v. Palmieri (App. 1938), 28 Ohio Law Abs., 398, appeal dismissed. (1939), 135 Ohio St. 30 [13 O.O. 526] 10

State v. Sallee (1966), 8 Ohio App. 2d 9 [37 O.O. 2d 5]..... 10

State v. Scott, 26 Ohio St. 3d 92 (1986)..... 7

State v. Wade (1978), Ohio St. 2d 182 [7 O.O. 3d 362]..... 10

Statutes:

Ohio Revised Code Section 2929.03..... 5

Ohio Revised Code Section 2929.04..... 5

Ohio Revised Code Section 2945.36(D)..... 10

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vs.

STATE OF OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio and the Supreme Court of Ohio.

The Court of Appeals, Eighth Judicial District, affirmed the convictions. Likewise, the Supreme Court of Ohio unanimously affirmed Petitioner's convictions.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is presented by the Petition for Certiorari.

HISTORY OF THE CASE

Petitioner appeals from his conviction and sentence for (a) Aggravated Murder while committing or attempting to commit Aggravated Robbery (Ohio Revised Code Section 2903.01(B)); (b) an aggravating circumstance that he committed the felony murder as the principal offender (Ohio Revised Code Section 2929.04(A)(4)); (c) Aggravated Robbery (Ohio Revised Code Section 2911.01); and (d) a penalty enhancing specification for committing the other offenses with a firearm (Ohio Revised Code Section 2941.141). Following their determination of his guilt, the jury decided that the aggravating circumstance for the felony murder outweighed any mitigating factors, and recommended the death penalty. The trial court independently evaluated the evidence, concurred in that recommendation, and ordered the petitioner's execution.

The Court of Appeals, Eighth Judicial District, after an independent review, required by Ohio law, unanimously upheld the convictions.

The Ohio Supreme Court, in State v. Scott, 26 Ohio St. 3d 92 (1986), unanimously affirmed Petitioner's convictions.

STATEMENT OF THE FACTS

The victim, an elderly woman, was killed by a single shot from a .38 caliber gun while she was operating her delicatessen near noon on May 6, 1983. The State called thirteen witnesses during the guilt phase of the trial: two alleged accomplices, a friend of the petitioner, and two of the alleged accomplices, three persons who were near the crime scene, two examiners from the coroner's office, and five police officers.

The first alleged accomplice, Danny Jones, testified that he drove his 1981 green and white Cadillac to the vicinity of the crime. The car had an expired 30-day temporary license in the rear window, but no license mounted on the rear bumper. The petitioner was a front seat passenger, while Edward O'Neal and Michael Streeter rode in the back. The four men had been drinking wine and beer as they rode around in the car that morning. The petitioner had a .38 caliber handgun, and one of the men passed around a .25 caliber chrome plated automatic. Jones said that they went to get some beer after leaving his

cousin's house. The first store they tried was closed, so they headed for the victim's delicatessen at Streeter's suggestion.

Jones said he parked the car approximately two blocks from the delicatessen, while the petitioner and O'Neal went to that store to get some beer and something to eat. Shortly thereafter, the petitioner and O'Neal returned to the car, running through a yard and jumping over a fence. The petitioner jumped head first through the open front window, and O'Neal returned to his seat in the back. Jones asked them, "What's wrong," and the petitioner replied, "Nothing." O'Neal was shaking his head. Jones drove off and went to his girfriend's house. When they arrived there, O'Neal said, "He shot the woman * * * he shot the old lady." Jones later asked the petitioner why he shot the woman in the store, and the petitioner told him, "She went for her shit," meaning that she reached for a weapon. Jones denied that the men had discussed robbery before they stopped near the delicatessen, despite his earlier statement to the police that Streeter had suggested it.

O'Neal testified that the four men had been riding in Jones' car when he asked to stop to get something to eat. The petitioner accompanied him into the delicatessen, where the woman operator was alone. Once inside, he realized that the delicatessen did not sell beer, so he ordered some bologna and crackers. She placed them on the counter to put them in a bag. O'Neal testified that the petitioner then drew his .38 caliber gun, pointed it at the woman, and told her, "Freeze." She cried out, and the petitioner shot her. O'Neal claimed that the petitioner grabbed him, and the two men ran back to the car. He denied that there had been any discussion about a robbery and said that nothing was taken from the store. The defendant later told him that he would not have shot the woman if she had not reached for a gun.

Ricky Tramble was a friend of three of the four men. On the afternoon and evening following the shooting, he was with them. The petitioner had a gun in his belt. Tramble heard the petitioner say, "Well, I did what I had to do. She shouldn't have made me move like that * * * Fuck it. It's over with." The petitioner later told him, "There niggers don't know what they're doing * * * and they get to crying about this and crying about that. This is what

I do." O'Neal subsequently recounted the events at the delicatessen. The defense sought to impeach Jones, O'Neal, and Tramble by showing their previous criminal records and the favorable plea bargains offered them to obtain their testimony.

Three people near the crime scene corroborated parts of the testimony by Jones and O'Neal. A woman saw a car which matched the general description of Jones' car move a short distance in front of her home. She lived at the place Jones said he parked while the other two men went to the delicatessen. There were only two occupants when she first saw it, the driver and a man in the back seat. Later, another man came running, jumped over a fence, and dove into the car's front window. The car then drove away.

A man who lived in the neighborhood of the delicatessen was approaching it when he heard a gunshot in the store. He heard the screen door slam, turned, and saw two men run from the store and through nearby yards. One of the men was carrying a gun. The witness called into the store, and heard the victim say, "Oh my God," twice. When he approached the store, he found the victim lying by the door "as if she were trying to chase them." He then flagged a nearby police car and told the officers that the suspects were still running down the street. A second witness from the neighborhood testified that he also saw two men run from the delicatessen, turn through an alley, and jump a fence.

A deputy coroner reviewed the autopsy protocol. She testified that the victim died from a gunshot and resulting internal injuries, with an entrance wound in the front of the chest and an exit wound in the left lower back. A trace evidence analyst from the coroner's office testified that her tests showed (a) the muzzle of the gun that fired the fatal shot was only twelve inches from the entry wound, and (b) the victim had not handled or fired a gun near the time of her death.

The first of the five police officers testified that he and his partner observed a man running down the street and shouting that someone had been shot. The man directed them to the delicatessen where they found the victim lying in the doorway with a gunshot wound. They called for an ambulance and assistance. A detective from the Scientific Investigation Unit discussed the

.38 caliber bullet which the police recovered from the delicatessen. It could not have been fired from the .25 caliber automatic which the police found on Jones when they arrested him. A second detective reported the call he received from Ricky Tramble and his later meeting with Tramble which caused him to locate Jones' Cadillac. He arrested Jones and recovered the .25 automatic.

A third detective described the crime scene as he found it shortly after the shooting. The cash register was open and dollar bills were on the floor. He identified various exhibits, including photographs of the scene that showed the cash register open and a dollar bill on the floor. The final police witness arrested the petitioner in Philadelphia, Pennsylvania, six months after the shooting. The petitioner told him that he had been in Pennsylvania the entire time and asked who had been using his name in connection with a shooting and robbery in Cleveland.

The defense relied on its cross-examination of the State's witnesses and called no additional witnesses for the guilt phase of the trial. After the jury found the defendant guilty, neither side called any witnesses for the penalty phase of the trial. The petitioner made a lengthy unsworn oral statement pursuant to Ohio Revised Code Section 2929.03(D)(1). In that statement, the only purported mitigating circumstance was his claim that he did not commit the offenses for which he had been convicted.

REASONS FOR DENYING THE WRIT

I. The Ohio Statutory Death Penalty Scheme which Permits the Jury to Consider as an Aggravating Circumstance that the Offender Committed an Aggravated Murder while Committing the Crime of Aggravated Robbery Does Not Violate the Eighth and Fourteenth Amendments of the United States Constitution.

Petitioner asserts that Ohio Revised Code Section 2929.03 and 2929.04 are unconstitutional for treating felony murders in a different manner than premeditated murders. According to Petitioner, a principal in a felony murder is treated more harshly than a defendant charged with a premeditated murder, since a felony murder constituted one of the eight aggravating circumstances under Ohio Revised Code Section 2929.04, while premeditation is

not set forth as an aggravating circumstance.

Stated otherwise, Petitioner argues that aggravating factors for felony murders simply duplicate an element of the offense while a murder by prior calculation and design requires proof of a separate aggravating circumstance in order to justify a death sentence. As such, Petitioner argues that a single act should not both convict and aggravate.

The proper rsponse to this so-called defect in the Ohio statute is found in State v. Jenkins, 15 Ohio St. 3d 164 (1984). The following passage from Jenkins is dispositive:

> Assuming, arguendo, that the elements set forth under R.C. 2929.04(A)(7) are identical to those set forth under R.C. 2903.01(B), we need only review the Texas statute at issue in Jurek to determine whether such a practice is constitutionally proscribed.
>
> The Texas statute under consideration in Jurek did not set forth a category of statutory aggravating circumstances which, if proven, would justify the imposition of the death penalty. Instead, the Texas system set forth five classes of murders the existence of any one of which would justify the imposition of a death sentence. The high court took notice of the fact that the five classes of murder set forth in the Texas statute encompassed the separate aggravating circumstances set forth in the Georgia and Florida statutes under consideration in Gregg and Proffitt.
>
> In sustaining the Texas statute, wherein the conduct which convicts also aggravates, the court stated:
>
> "* * * So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option - even potentially - for a smaller class of murderers in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime." Jurek, supra, at 271.
>
> Applying Jurek to the arguments raised by appellant in the present case demonstrates that even if we were to construe the aggravated conduct of felony murder set forth within R.C. 2903.01(B) as functionally equivalent to the aggravating circumstance under R.C. 2929.04(A)(7), no constitutional infirmities would arise. On the contrary, any duplication is the result of the General Assembly having set forth in detail when a murder in the course of a felony rises to the level of a capital offense, thus, in effect, narrowing the class of homicides in Ohio for which the death penalty becomes available as a sentencing option.

2. A Jury Instruction in a Capital Case Does Not Violate the Eighth and Fourteenth Amendments of the United States Constitution When it Orders the Jury Not to be Influenced by any Consideration of Sympathy Toward any Party, and When No Objection is Offered to the Instruction Given.

Petitioner next contends that the jury was improperly instructed during the sentencing phase as to considerations of mercy, compassion and sympathy.

At the conclusion of the penalty phase, the trial court instructed the jury:

> You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the Court to your findings, and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

It is apparent that Petitioner did not object to this instruction at trial. Hence, pursuant to State v. Fanning, 1 Ohio St. 3d 19, 437 N.E. 2d 583 (1982), this error need not be considered absent plain error. In State v. Jenkins, supra, this court reviewed a similar jury instruction advising the jury to exclude bias, sympathy or prejudice from consideration during the penalty phase of the trial. The court stated at 192 that this instruction "* * * is necessary and entirely consistent with the view expressed by the United States Supreme Court in Barclay v. Florida (1983), 463 U.S. 939 at 1144, 103 S. Ct. 3418, that, '[t]he thrust of our decisions on capital punishment has been "that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."* * *'" (Citations omitted.)

3. Petitioner's Due Process Rights Were not Violated by a Trial Court's Correct Instruction to the Jury that a Death Verdict was Only a Recommendation. Such an Instruction did not Diminish the Jury's Responsibility to Impose a Death Sentence, especially When No Objection was Offered to the Instruction.

The Ohio Supreme Court addressed this argument in State v. Scott, 26 Ohio St. 3d 92 (1986) by noting that the petitioner did not object to the instruction given by the trial judge:

> Appellant also attacks the trial court's sentencing instruction on the basis that it improperly diminished the jury's responsibility for imposition of the death penalty.
>
> Once again, it is apparent that appellant did not object to this instruction at trial. As a rsult, any error

involved with this instruction may be deemed waived. State v. Fanning, supra.

Nevertheless, appellant may still argue that this instruction constitutes plain error under Crim. R. 52(B). Under this court's holding in State v. Long (1978), 53 Ohio St. 2d 91 [7 O.O. 3d 178], a defective jury instruction is not plain error unless "the outcome of the trial clearly would have been otherwise" if the error had not occurred. Id. at 97. Further, pursuant to R.C. 2929.05(A) appellate review of a capital offense is to be carried out in the same manner as other criminal cases.

In support of this proposition, appellant relies primarily on the United States Supreme Court's recent decision in Caldwell v. Mississippi (1985), 472 U.S. ___, 86 L. Ed. 2d 231, where the court reviewed a prosecutor's comments urging the jury not to view itself as determining whether the defendant would die because any death sentence would be reviewed for correctness by the state supreme court. The court concluded that the prosecutor's comment warranted reversal in that it was inaccurate "* * * both because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform.* * * Id. at 243-244).

However, the Caldwell decision concerned a prosecutor's misstatement of the law as opposed to a trial court's instruction to a jury. Such a situation was directly addressed by the United States Supreme Court in California v. Ramos (1983), 463 U.S. 992. Therein, the court reviewed a jury instruction advising the jury that the governor had the authority to commute a life sentence without the possibility of parole, so parole would be possible. In upholding this instruction, the Ramos court at 1012-1013 reasoned:

"* * *[T]he State is constitutionally entitled to permit juror consideration of the Governor's power to commute a life sentence. This information is relevant and factually accurate and was properly before the jury* * *

"* * *It does not preclude individualized sentencing determinations or consideration of mitigating factors, nor does it impermissibly inject an element too speculative for the jury's deliberation. Finally, its failure to inform the jury also of the Governor's power to commute a death sentence does not render it constitutionally infirm. Therefore, we defer to the State's identification of the Governor's power to commute a life sentence as a substantive factor to be presented for the sentencing jury's consideration."

In the case sub judice, the trial judge instructed the jury in relevant part as follows:

"A jury recommendation to the Court that the death penalty be imposed is just that - a recommendation.

"* * *

"* * *[Y]ou will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court. Your recommendation to the Court shall be one of the following: That Jay Scott be sentenced to life imprisonment with p-role eligibility after 20 full years of imprisonment; or Jay Scott be sentenced to life imprisonment with parole eligibility after 30 full years of imprisonment.

"This particular recommendation which you make is binding upon the Court, and I, the Judge, must impose the specific life sentence which you recommend."

This instruction precisely sets forth the caiptal punishment sentencing procedure as codified in R.C. 2929.03(D)(2). In State v. Buell (1986), 22 Ohio St. 3d 124, 144, this court found that a jury instruction which presented an accurate description of the sentencing procedure embodied in R.C. 2929.03(D)(2) was not constitutionally infirm. Accordingly, this proposition of law is without merit.

4. A Trial Judge's Comment which Does Not Concern the Petitioner's Guilt or Innocence but, Rather, Noted the Fact that the News Media had Reported Petitioner's Involvement with the Crime, Does Not Violate Due Process of Law.

Petitioner contends that the trial judge wrongfully abused his discretion in refusing to declare a mistrial. This contention is premised upon the following comments made by the trial judge during voir dire:

[THE COURT]: Now ladies and gentlemen, I have given you about as much as the Court really knows about the case, and there has been some - I know, some publicity or notoriety about it at the time that it occurred. I only know that because I happened to see an article printed in the newspaper at the time. You know that the victim is Vinnie Price (sic) and it's the Court's understanding that she was a storekeeper, and that the allegations concerning the robbery apparently occurred at her store.

Mr. Gerstenslager, do you have an idea of the neighborhood in which the store - the address- of the store; I don't-

MR. GERSTENSLAGER: [Assistant Prosecutor] 84 (sic) and Quincy.

THE COURT: 84th (sic) and Quincy. Not only was Mr. Scott - at least from the newspaper reports that I think that I had read - was involved in this,

there were three other-

MR. EISNER: [Defense Counsel] Objection-

THE COURT: -individuals who- pardon?

MR. EISNER: Your Honor, I object.

THE COURT: Come to the sidebar.

Shortly after this statement was made, defense counsel moved the court for a mistrial on the basis that the court's mention of a report linking the petitioner to the crime for which he was charged irreparably tainted the prospective jurors. Counsel for the prosecution "reluctantly" joined the motion for mistrial. The court overruled the joint motion for mistrial, but administered a lengthy cautionary instruction to the prospective jurors stressing that their judgment must be based solely upon the evidence adduced at trial. The judge also cautioned the jurors against being unduly influenced by any remarks the court may have made.

Pursuant to Ohio Revised Code Section 2945.36(D), a trial judge may discharge a jury without prejudice to the prosecution by the consent of the prosecuting attorney and the defendant. However, this action is subject to the discretionary judgment of the trial judge. State v. Sallee (1966), 8 Ohio App. 2d 9 [37 O.O. 2d 5]; State v. Palmieri (App. 1938), 28 Ohio Law Abs. 398, appeal dismissed (1939), 135 Ohio St. 30 [13 O.O. 526]. In State v. Wade (1978), Ohio St. 2d 182 [7 O.O. 3d 362], this court set forth the following analytical criteria to determine whether a trial judge's remarks were prejudicial so as to require a mistrial:

> (1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they were made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel. Id. at 188.

When analyzed under this test, the trial judge's comments do not appear to require the declaration of a mistrial. The judge's alleged prejudicial comment was made at a point when the court was examining prospective jurors regarding their exposure to pretrial publicity. The judge's comment did not

did not concern the petitioner's guilt or innocence, but, rather, noted the fact that the news media had reported Petitioner's involvement with the crime. Thus, the remark at issue, when analyzed in light of the circumstances under which it was made, did not cast an aspersion upon Petitioner's innocence.

Further, the lengthy instruction which the trial judge gave to the prospective jurors after issuing this comment was such as to minimize any prejudicial effect this comment may have had upon the jurors.

Therefore, the petitioner's argument is without merit.

CONCLUSION

In conclusion, the Respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by the Court.

The Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio

By _____
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SERVICE

A copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been mailed this 30 day of January, 1987, to Robert M. Ingersoll, Counsel for Petitioner, Assistant Public Defender, The Marion Building, Room 307, 1276 West Third Street, Cleveland, Ohio 44113.

_____
GEORGE J. SADD
Assistant Prosecuting Attorney

NO. 86-5953

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JAY D. SCOTT

Petitioner

vs.

STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

AFFIDAVIT OF FILING

I George J. Sadd, being first duly cautioned and sworn, deposes and say that I am a member of the bar of this Court and otherwise competent to execute this Affidavit, pursuant to Rule 28.2, Rules of the United States Supreme Court. On the twentieth day of January, 1987, I caused to be sent by first class, prepaid United States mail, to the Clerk of Court, United States Supreme Court, 1 First Street, Washington, D.C. 20543, one copy of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Supreme Court in the above captioned matter. Such mailing was made within the time permitted by this Court for such a filing.

GEORGE J. SADD
Assistant Prosecuting Attorney
The Justice Center
1230 Ontario Street
Cleveland, Ohio 44113
(216) 443-7730

SWORN to before me and subscribed in my presence, this 16th day of January, 1987.

NOTARY PUBLIC

SANDRA BLANKO
Notary Public, State of Ohio
Recorded in Cuyahoga County
My Comm. Expires 10-26-91

OHIO REVISED CODE SECTION 2945.36 - FOR WHAT CAUSE JURY MAY BE DISCHARGED

The trial court may discharge a jury without prejudice to the prosecution:

(A) For the sickness or corruption of a juror or other accident or calamity;

(B) Because there is no probability of such jurors agreeing;

(C) If it appears after the jury has been sworn that one of the jurors is a witness in the case;

(D) By the consent of the prosecuting attorney and the defendant;

The reason for such discharge shall be entered on the journal.

2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if he was not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after having the matter of age raised as that he have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it.

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

(4) The youth of the offender.

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications.

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim.

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statements of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds, that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

SUPREME COURT OF THE UNITED STATES

JAY D. SCOTT *v.* OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 86–5953. Decided March 9, 1987

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of certiorari.

Petitioner was convicted and sentenced to death by a jury that heard the trial judge indicate that, on the basis of newspaper accounts he had read, he believed petitioner was involved in the crime. Because the judge's statement deprived petitioner of a fair trial, I would grant certiorari in this case.

During voir dire, the trial judge stated to the jury:

> "Not only was Mr. Scott—at least from the newspaper reports that I think that I had read—was involved in this, there were three other . . . individuals who . . . " 26 Ohio St. 3d 92, 95 (1986).

Defense counsel interrupted to object to this comment on petitioner's involvement in the crime. He subsequently made a motion for a mistrial, in which the prosecutor joined. The trial court denied the motion, but delivered a cautionary instruction admonishing the jury to base its verdict only on the evidence introduced at trial. The judge also told the jury, "[Y]ou must not take any impression from anything I have done or said as to what your decision should be." App. to Pet. for Cert. 33–34.

The Ohio Supreme Court attempted to excuse the remark. The court insisted that "[t]he judge's comment did not concern [petitioner's] guilt or innocence, but, rather, noted the fact that the news media had reported [petitioner's] involvement with the crime." 26 Ohio St. 3d, at 96. This is a ludi-

cro[illegible]s reading of the statement. How the jury could reasonably have interpreted and applied the comment determines whether it should be considered prejudicial. See, *e. g.*, *Sandstrom* v. *Montana*, 442 U. S. 510, 516–519 (1978). In this case, the jury could reasonaby take the comment at face value, namely, as a statement that, based on what he had read in the newspapers, the judge believed petitioner was a participant in the crime. Before the jury had even heard any the evidence, the judge had effectively become a witness against petitioner. See *United States* v. *Murdock*, 290 U. S. 389, 393 (1933).

Moreover, even under the Ohio Supreme Court's dubious interpretation, the judge's comment deprived petitioner of a fair trial. The only legitimate judicial references to pretrial publicity would have been inquiries about exposure to pretrial publicity or warnings against it. Instead, the judge actually reported to the jurors the media's conclusion that petitioner was guilty. That the source of this prejudicial publicity was the trial judge magnifies, rather than eliminates, the problem. The jury could reasonably assume that, since the judge had read about the crime, it was acceptable for them to do so as well.

The Ohio Supreme Court relied on the cautionary instruction given to the prospective jurors, maintaining that it "minimize[d] any prejudicial effect this comment may have had . . . . " *Id.*, at 96. This reliance is misplaced. Because "the influence of the trial judge on the jury is necessarily and properly of great weight, and . . . his lightest word or intimation is received with deference, and may prove controlling," *Starr* v. *United States*, 153 U. S. 614, 626 (1894), some errors are so fundamental that no instruction can undo the damage they cause. See *Quercia* v. *United States*, 289 U. S. 466, 472 (1933). A comment on petitioner's guilt is certainly such a fundamental error; it is "most likely to remain firmly lodged in the memory of the jury and to excite the prejudice which would preclude a fair and dispassionate consideration of the

evidence." *Ibid.* Moreover, any reference to extrajudicial evidence by the trial judge destroys the fundamental premise of any trial—that the ultimate decision rests solely upon evidence presented by the parties within the confines of the rules of evidence.

The remedy for this extraordinary error was close at hand. No witness had yet been sworn. The panel of prospective jurors might have been discharged and a new venire called without difficulty. Nonetheless, the trial judge plunged ahead and petitioner was tried by a jury exposed to comments that overwhelmed the presumption of innocence. Because we cannot tolerate such interference with petitioner's right to a fair trial in a capital case, I would grant the petition for certiorari.

In addition, petitioner's death sentence was founded on a statutory aggravating circumstance that repeats an element of the underlying capital offense. As in No. 86–5307, *Williams* v. *Ohio*, and No. 86–6015, *Bradley* v. *Alabama*, I would grant review for reasons stated in my dissent from denial of certiorari in *Wiley* v. *Mississippi*, —— U. S. —— (1986).